

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

LARRY GAPEN,

Petitioner, : Case No. 3:08-cv-280

- VS -

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

DAVID BOBBY, Warden,

Respondent. :

**ORDER TO FILE THIRD AMENDED PETITION FORTHWITH AND
FOR AMENDED ANSWER AND REPLY**

On December 7, 2012, the Magistrate Judge granted in part and denied in part Gapen's Motion for Leave to File a Third Amended Petition, allowing the proposed Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, and Thirtieth Grounds for Relief and denying the proposed Thirty-First Ground (Doc. No. 169). The Warden filed no objections to the Decision and Order, but Gapen objected to denial of Ground Thirty-One (Doc. No. 170).

Gapen has now withdrawn that Objection and abandoned proposed Ground Thirty-One (Doc. No. 174). It is accordingly ORDERED that Petitioner file his Third Amended Petition in the form attached as an exhibit to Doc. No. 148, but with the Thirty-First Ground for Relief deleted, not later than February 1, 2013. Respondent shall file an amended answer not later than February 15, 2013. Petitioner shall file a reply to the amended answer not later than March 1, 2013.

Not later than March 1, 2013, Petitioner shall file his motion seeking the relief he deems

appropriate with respect to newly-made claims which he asserts are unexhausted. In the Decision and Order granting in part the Motion to Amend, the Magistrate Judge wrote:

Gapen has asserted that all of these new claims are unexhausted and the Warden has declined to waive the exhaustion defense. A determination by the Magistrate Judge on how to deal with the exhaustion issue is postponed pending a decision by Judge Rice on any objection to/appeal of this Order.

(Decision and Order, Doc. No. 169, PageID 4688.) Prior to March 1, 2013, counsel for the parties shall consult to determine if they can agree on a process to deal with the exhaustion questions raised by the newly-added claims. The results of that consultation shall be reported to the Court with the Petitioner's March 1, 2013, motion.

January 28, 2013.

s/ *Michael R. Merz*
United States Magistrate Judge